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 6           Donald Chen and Stephanie Chan

7           UNITED STATE DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

9           DONALD CHEN and STEPHANIE CHAN	)	<b>CASE NO.: 3:21-CV-5065</b>
	)	<b>OPPOSITION TO MOTION FOR</b>
	)	<b>FULL OR PARTIAL SUMMARY</b>
	)	<b>JUDGMENT</b>
11           Plaintiffs,	)	Date: October 3, 2022
12           v.	)	Time: 9:30 a.m.
13           CHENG HU and XIAO LIANG and DOES 1-10 inclusive	)	Ctrm/Dept: Courtroom C, 15th Floor
	)	450 Golden Gate Ave.
	)	San Francisco, CA 94102
14           Defendants	)	Judge: Magistrate Judge Sallie Kim
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	)	Complaint filed: June 1, 2021
	)	Action removed to this court: June 30, 2021
	)	Trial date: January 24, 2023

18           **I. Introduction**

19           Plaintiffs Donald Chen and Stephanie Chan live at 200 Robinwood Lane, in  
 20 Hillsborough CA, 94010. Their neighbors Cheng Hu and Xiao Liang lived at 325 Moseley  
 21 Road, Hillsborough CA, 94010. A mudslide emanating from Defendants' property caused  
 22 debris and soil from the Defendants' property to slide down into the Plaintiffs' property.  
 23 Importantly, the slide rendered the Plaintiff's pool unusable. The pool was one of the reasons  
 24 why the Plaintiff's bought the property, and a key factor in the value and enjoyment of the  
 25 property.

26           Plaintiffs obtained an estimate for \$185,000 to remove all the debris and repair the  
 27 damage to the property, and requested that the Defendants pay the cost of repairs. Damages are  
 28

1 ongoing, as the Defendants have failed to help remedy the situation. Plaintiffs have filed a  
 2 Complaint against Defendants for Nuisance, and Trespass, in San Mateo Superior Court.  
 3 Defendants filed a request for Removal to Federal Court based on diversity jurisdiction.

4 Defendants are now filing a Motion for Summary Judgment, claiming that it was not  
 5 responsible for the mudslide in 2017, and arguing that is an essential element of Plaintiffs'  
 6 claims against the Defendants. However, Plaintiff's claims against the Defendants are instead  
 7 based on the fact that after the landslide, Defendant had a duty to help remove the soil from  
 8 Plaintiffs Property. Additionally while Plaintiffs' expert witness notes improvements the  
 9 Defendants made to the retaining wall after the mudslide, it failed to make the improvements  
 prior to the mudslide which could have helped to prevent the mudslide.

10 **II. Facts**

11 Plaintiffs have alleged facts to support a complaint for both trespass and nuisance  
 12 causes of action. *See* Plaintiff's Complaint for Nuisance and Trespass filed on June 1, 2021.  
 13 Plaintiffs own the property at 200 Robinwood Lane, in Hillsborough CA, 94010. Complaint at  
 ¶1, and Declaration of Donald Chen at ¶1. In 2017, a mudslide from the Defendants' property  
 14 left a mass of loose soil on Plaintiffs Property, including filling up the Plaintiffs' pool so that it  
 15 could not be used, without removing the soil. *Id.* at ¶2-3. The Defendants' retaining wall was  
 16 not tall enough, and was buried under the landslide. See Report from Cotton Shires and  
 17 Associates dated June 30, 2022. Defendants were obligated to help remove the soil.  
 18 Declaration of Donald Chen at ¶6. When Plaintiff's attorney contacted Defendant to request  
 19 their assistance, Defendants agreed. Declaration of Donald Chen at ¶7-8 Plaintiff's attorney  
 20 told Defendants they were responsible for the soil, that it came from their property, and that  
 21 Defendants needed to help remove it from the Plaintiffs' property. *Id.* Defendants' agent agreed  
 22 with Plaintiffs' attorney, 100%. *Id.* Later Defendants reneged on this agreement. *Id.* The soil  
 23 continues to be in the Plaintiff's property, and the Defendants have continued to fail to remove  
 24 the obstruction despite repeated requests from Plaintiffs. *Id.* at ¶9.

25 Plaintiffs filed their request for Trespass and Nuisance based on Defendants' failure to  
 26 help with the removal of the obstruction to Plaintiff's property.  
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1           **III. Argument**

2           **A. The Plaintiff's Nuisance Claim has a Genuine Dispute to be Adjudicated**

3           The moving party has the burden of demonstrating the absence of a genuine issue of  
 4 material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) Under  
 5 California Civil Code Section 3479 an obstruction to the free use of property, so as to interfere  
 6 with the comfortable enjoyment of life or property, is a nuisance. Under the CACI No. 21 Jury  
 7 instructions the elements of nuisance are that 1) Plaintiff owned property, 2) that Defendants'  
 8 action or failure to act created a condition that obstructed the Plaintiff's enjoyment of Property,  
 9 3) that Defendants' conduct in acting or failing to act was intentional, or negligent, 4) that the  
 10 condition interfered with Plaintiffs' enjoyment of their Property, 5) that an ordinary person  
 11 would be annoyed by Defendant's conduct, 6) that Plaintiff did not consent to Defendants'  
 12 conduct, 7) that Plaintiff was harmed, 8) that Defendants' conduct was a substantial factor in  
 13 causing that harm, and 9) that the seriousness of the harm outweighs the public benefit of  
 14 Defendants' conduct.

15           Liability for nuisance may result from the failure to act. 13 Witkin, *Summary of*  
 16 *California Law*, (11th edition Equity)(2022) § 160. Thus, a possessor of land is liable for a  
 17 private nuisance caused by an abatable artificial condition that is otherwise actionable, if the  
 18 possessor (a) knows or should know of the condition and the nuisance or unreasonable risk of  
 19 nuisance involved; (b) knows or should know that the condition exists without the consent of  
 20 those affected by it; and (c) has failed after a reasonable opportunity to take reasonable steps to  
 21 abate the condition or to protect affected persons. (See *Cutujian v. Benedict Hills Estates Assn.*  
 22 (1996) 41 C.A.4th 1379, 1389, 49 C.R.2d 166.) *Id.*

23           Defendants are mistaken in their argument that they not responsible for damage caused  
 24 by the initial landslide, which they claim excuses them from a claim of nuisance. They are also  
 25 mistaken in their argument that there is not a material dispute over facts in this case. This claim  
 26 is wrong on two counts.

27           First, the Defendants contend that Plaintiffs are responsible for the damage to  
 28 Plaintiffs' property. The Plaintiffs were responsible for not having a sufficient retaining wall to

1 prevent the landslide from causing loose soil to migrate from Defendants Property onto  
2 Plaintiff's Property. Plaintiffs' expert report states that the mudslide buried the Defendant's  
3 retaining wall. This is evidence that the Defendants' retaining wall was insufficiently  
4 maintained to prevent loose soil from entering the Plaintiffs' property. Defendants themselves  
5 point to the fact that after the landslide they made repairs to their retaining wall, showing that it  
6 was not a proper height at the time of the landslide. The condition of the retaining wall before  
7 the mudslide is a material fact that goes to whether Defendants were responsible for the  
8 resulting damage to the Plaintiffs' property.

9       Secondly, the Defendants also were legally obligated to remove the loose soil that had  
10 come from their Property onto the Plaintiffs' property. The Plaintiffs had informed Defendants  
11 that the soil from the Defendants' property had come down into the Plaintiffs' property. The  
12 Plaintiffs made it clear to the Defendants that they did not consent to this nuisance, and  
13 demanded that Defendants help to remove the loose soil from the Property. Defendants did not  
14 help to remove the soil, which would have been a reasonable step to take to abate the nuisance.  
15 The Defendants had a responsibility as reasonable landowners to take care of the loose soil that  
16 spilled out of their property onto the Plaintiff's property. In addition they made promises to the  
17 Plaintiffs that they would help with the removal of soil. The failure of the Defendants to  
18 remove the soil from the Plaintiffs' property qualifies as a failure to act that has created the  
19 condition of the Plaintiffs' pool continuing to be unusable, as well as the soil continuing to  
20 obstruct the property, and preventing the Plaintiffs from using the pool.

21       The Plaintiffs were reasonably annoyed by Defendants' conduct, as it took away their  
22 ability to use their pool and fully enjoy their property, and they did not consent to it. Plaintiffs  
23 were harmed, and their property was harmed, and Defendants' conduct was a substantial factor  
24 in causing that harm. The seriousness of the harm outweighs any public benefit of the  
25 Defendants' conduct, because there is no public benefit to Defendants failure to help Plaintiffs  
26 repair the damage done to their property. In fact, repairing the situation benefits the public  
27 interest as it will make the property safer to use. This is an ongoing trespass and nuisance, that  
28 Defendant continually commits by intentionally failing to follow through on their promise to

1 Plaintiff to repair the damage done.

2 In this case, the disputed material facts are 1) whether Defendants were negligent in  
 3 their maintenance of their property regarding having a maintaining wall that could prevent  
 4 loose soil from descending onto the Plaintiff's property, and 2) whether Defendants' failed to  
 5 abate the damage to Plaintiffs' property when they were legally obligated to do so. Because  
 6 Plaintiffs have alleged facts sufficient for a claim of Nuisance, and provided enough support  
 7 for there to be triable issues, the Defendants Motion for Summary Judgment against the  
 8 Plaintiffs' claim for nuisance should be denied.

9 **B. The Plaintiff's Trespass Claim has a Genuine Dispute to be Adjudicated**

10 The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2)  
 11 the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission  
 12 for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a  
 13 substantial factor in causing the harm." (*Ralphs Grocery Co. v. Victory Consultants, Inc.*  
 14 (2017) 17 Cal.App.5th 245, 261–262 (Victory Consultants).)

15 Plaintiffs own the property at 200 Robinwood Lane, in Hillsborough CA, 94010.  
 16 Plaintiffs' position is that Defendants are liable for the damage caused to the Plaintiff's  
 17 property; and because they have not acted to remove the loose soil, they are liable for the  
 18 ongoing damage. After the mudslide on their property, they promised to help Plaintiffs by  
 19 removing the soil from Plaintiffs' property, but they never did, allowing a continuing condition  
 20 that obstructed Plaintiffs' enjoyment of their property. Defendants' conduct was intentional  
 21 because they did not properly repair the retaining wall, or remove the soil from Plaintiffs'  
 22 property. They did not consent to the Defendants' soil entering the Plaintiffs' property. As a  
 23 result, Plaintiffs have not been able to enjoy the full use of their property, and been unable to  
 24 use their pool since 2017. The Defendants refusal to help remove the soil from Plaintiffs'  
 25 property is a substantial factor in the harm persisting. Plaintiffs have alleged all the elements  
 26 of Trespass and Defendants' Motion for Summary Judgment fails to show that there are no  
 27 triable issues of fact. Because of this Defendants' Motion for Summary Judgment should fail.

28 The Defendants have not disputed that their soil went onto the Plaintiffs Property, so

1 there are undisputed facts showing an invasion of the Plaintiffs property from the Defendants'  
2 property. At the very least this is a negligent entry from the Defendants property, which the  
3 Defendants have failed to properly abate, and which is grounds to continue the Trespass claim.

4 **IV. Conclusion**

5 Defendants' motion for summary judgment should fail because there is a genuine  
6 dispute over material facts. Plaintiffs contend that Defendant's retaining wall was not sufficient  
7 to prevent the landslide from causing soil to enter the Plaintiffs' property, and that Defendants  
8 had a responsibility to clean up the loose soil, and their failure to do so is the cause of the  
9 damage to the Plaintiff's property, which is grounds for both a Trespass and a Nuisance Claim.

10  
11 DATED: 8/23/22

Respectfully Submitted,



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15 Mark C. Watson, Esq.  
16 Attorney for Plaintiffs Donald  
17 Chen and Stephanie Chan

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